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No. 97-801

In the Supreme Court of the United States

OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In order to provide some of the funds needed to decontaminate Department of Energy uranium enrichment facilities, Congress imposed a special assessment on those domestic nuclear utilities that had purchased, either from the Department of Energy directly or in the secondary market, the uranium enrichment services that caused the contamination. 42 U.S.C. 2297g, 2297g-1. The question presented is: Whether application of the assessment to utilities that purchased the uranium enrichment services pursuant to fixed-price contracts breaches those contracts or violates the utilities' due process rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 112 F.3d 1569. The opinion of the Court of Federal Claims (Pet. App. 33a-43a) is reported at 33 Fed. Cl. 580.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1997. Pet. App. 32a. A petition for rehearing was denied on August 15, 1997. Pet. App. 44a-45a. The petition for a writ of certiorari was filed on November 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1992, Congress created a "comprehensive national energy policy" designed "to implement solutions to our nuclear waste and uranium enrichment problems." H.R. Rep. No. 474, 102d Cong., 2d Sess. Pt. 1, at 132 (1992). Among those problems was the fact that existing uranium enrichment plants, which the Department of Energy (DOE) had used to provide enrichment services to domestic utility companies since the 1950s, needed to be decontaminated and decommissioned.

Testifying before the House Ways and Means Committee in support of the cleanup effort, representatives of domestic nuclear utilities expressed their approval of a special assessment on those domestic utilities that had purchased the contaminating uranium enrichment services, but suggested that the term of the special assessment be limited to 15 years or the time necessary to collect $2.5 billion, whichever came first. See *Comprehensive National Energy Policy Act: Hearing Before the House Comm. on Ways and Means*, 102d Cong., 2d Sess. 178-183 (1992). Supporters of that proposal included the Edison Electric Institute, of which petitioner was a member. *Ibid.*

Sections 1801 and 1802 of the Atomic Energy Act of 1954, as added by the Energy Policy Act of 1992 (Energy Policy Act), Pub. L. No. 102-486, § 1031, 106 Stat. 2953-2954, codified at 42 U.S.C. 2297g and 2297g-1, establish a Uranium Enrichment Decontamination and Decommissioning Fund to accumulate the funds necessary for the cleanup of the uranium enrichment facilities. The Fund is derived primarily from congressional appropriations, supplemented by a

limited annual special assessment collected from the utility companies that purchased and used the contaminating uranium enrichment services. The determination of the utilities to be assessed, and the amount to be assessed from each, depends upon the share of the uranium enrichment services that each utility purchased and did not resell. Thus, for example, if a utility had purchased five percent of the contaminating uranium enrichment services, that utility would be assessed five percent of the annual special assessment, unless the utility had later resold the services, in which case the services would be counted toward the purchasing utility's *pro rata* share and deducted from the selling utility's share. 42 U.S.C. 2297g-1(c). The special assessment terminates after the earlier of 15 years or the collection of $2.25 billion. 42 U.S.C. 2297g-1(e). Each utility that is subject to the assessment is authorized to count the assessed amounts as a "necessary and reasonable current cost of fuel," which is thus "fully recoverable in rates * * * in the same manner as the utility's other fuel cost." 42 U.S.C. 2297g-1(g).

2. Petitioner is a utility company formed by several domestic utilities for the purpose of owning and operating a nuclear-powered electricity-generating plant in Massachusetts. Between 1960 and 1983, petitioner purchased uranium enrichment services for its plant from the DOE pursuant to a series of fixed-price contracts. Pet. App. 2a.

Petitioner paid approximately $3 million in assessed amounts under the Energy Policy Act and filed suit in the Court of Federal Claims to recover its payments. Pet. App. 4a. Petitioner alleged that the special assessment breached its fixed-price contracts and constituted a taking of its property for

which it was entitled to compensation under the Fifth Amendment. Petitioner further claimed that it was not subject to the special assessment because it did not fall within the scope of the term "domestic utility" under 42 U.S.C. 2297g-1(c) and (g). Pet. App. 33a-34a.

After the parties filed cross-motions for summary judgment, the Court of Federal Claims held that the special assessment breached petitioner's fixed-price contracts with the government. Pet. App. 33a-43a. The court accordingly ordered the government to refund petitioner's special assessment payments. *Id.* at 43a.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-31a. The court initially observed that, although petitioner had argued that the special assessment breached its contracts with the government, the case "d[id] not appear to * * * involv[e] a breach of contract," because the contracts upon which petitioner premised its claim were "fully performed by both parties." *Id.* at 6a n.2.

Although concluding that a contract claim was unavailable, the court nonetheless addressed and rejected petitioner's contention that its contracts with the government constrained Congress's power to impose the special assessment. Pet. App. 6a-21a. The court held that the special assessment was a valid exercise of Congress's sovereign power. *Id.* at 6a-14a. The court explained that Congress enacted the special assessment to address the problem of contamination in uranium enrichment plants, and not for the purpose of retroactively increasing the price in the government's previous contracts with petitioner. *Id.* at 9a. The court further reasoned (*id.* at 10a) that the Energy Policy Act applies not only to those utilities

that had entered into contracts with the government, but also to utilities that had purchased government-enriched uranium from other utilities. See 42 U.S.C. 2297g-1(c)(1). Conversely, the court explained (Pet. App. 10a) that the Act does not apply to utilities that contracted with the DOE if those utilities resold the services to another utility. See 42 U.S.C. 2297g-1(c)(2).

The court then addressed the question whether the government, in "unmistakable" terms, had surrendered its right to exercise its sovereign authority to adopt the special assessment. Pet. App. 14a-21a. The court examined the language of the contracts and concluded that "the fixed-price terms of the contract[s] do not constitute an unmistakable promise on behalf of the government that it will not impose a general assessment upon all utility companies that benefited from the DOE's uranium enrichment services." *Id.* at 20a. The court explained that, although the contracts assured petitioner that the government would "provid[e] the enriched uranium at the agreed-upon price," the Energy Policy Act's special assessment "is not a deliberate retroactive increase in the price of those contracts." *Ibid.* "Instead," the court continued, the assessment "is the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service, whether or not those services were acquired by contract from the Government." *Ibid.*

The court also rejected petitioner's claim under the Just Compensation Clause. Pet. App. 21a n.8. The court observed that, because petitioner's contracts did not expressly or implicitly touch upon the subject of the cleanup costs that might arise when the enrich-

ment facilities were closed, petitioner's contracts created no vested property rights in regard to that subject which could be "taken" by the special assessment. *Ibid.*[1]

Judge Mayer dissented. Pet. App. 25a-31a. He agreed with the panel majority's conclusion that petitioner could not prevail on its breach-of-contract theory because "the contracts were fully and satisfactorily performed." *Id.* at 25a. In his view, however, the special assessment violated what he believed to be vested rights of petitioner under the fixed-price contracts and constituted an uncompensated taking. *Id.* at 26a-28a. The dissent also expressed the view that neither the "sovereign acts" doctrine nor the "unmistakability" doctrine applied in this case. *Id.* at 29a-31a.

ARGUMENT

The court of appeals correctly concluded that the Energy Policy Act's special assessment does not breach petitioner's fully performed contracts with the government. Even assuming that petitioner's claim had some basis in the law of contracts, however, the decision below correctly holds that petitioner's claim is barred by the "sovereign acts" and "unmistakability" doctrines. Petitioner's remaining due process claim is not properly before this Court and would not merit this Court's attention in any event.

1. Petitioner renews (Pet. 7-16) its contention that the Energy Policy Act's special assessment violated petitioner's contracts with the government by retro-

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[1] The court also rejected petitioner's claim that it did not fall within the scope of the statutory term "domestic utility." Pet. App. 22a-23a. Petitioner does not challenge that holding in this Court.

actively increasing the price of services purchased under those contracts. Petitioner also argues (*ibid.*) that this Court's review is warranted to consider the court of appeals' application of the "sovereign acts" and "unmistakability" doctrines. Those contentions lack merit.

As the court of appeals correctly observed (Pet. App. 6a n.2), no contract claim for breach may be brought pursuant to contracts that have already been fully performed. See also *id.* at 25a (Mayer, J., dissenting) ("The parties * * * agree that the contracts were fully and satisfactorily performed."). After a contract is fully performed and the contractual relationship ends, the parties may no longer bring contract-based actions against one another. See, *e.g.*, *John J. Kirlin, Inc.* v. *United States*, 827 F.2d 1538, 1541 (Fed. Cir. 1987); *Mulholland* v. *United States*, 361 F.2d 237, 239-240 (Ct. Cl. 1966). Thus, although the court proceeded to discuss the "sovereign acts" and "unmistakability" doctrines, petitioner's contract claim properly could have been rejected without recourse to those doctrines. Those doctrines are defenses against attempts to hold the government to its contractual obligations, or to recover for breach of those obligations. See, *e.g.*, *United States* v. *Winstar Corp.*, 116 S. Ct. 2432, 2448 (1996) (opinion of Souter, J.). When, as in the present case, the government has fulfilled its contractual obligations, no action for breach of contract may be brought, and thus no such defenses are necessary.[2]

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[2] Even if the government's contracts with petitioner had not yet been fully performed, petitioner has presented no legal support for its assertion (Pet. 9-16) that the fixed-price terms in its contracts incorporated the costs related to dealing with

Accordingly, further review of the court of appeals' discussion of those defenses is unwarranted.

2. In any event, the court of appeals correctly held that the "sovereign acts" and "unmistakability" doctrines would bar petitioner's contract claim, if such a claim otherwise would lie with respect to petitioner's completed contract.

a. Petitioner contends (Pet. 9-16) that the decision below improperly applied the "sovereign acts" doctrine because the special assessment substantially affects the government's contracting parties. Petitioner relies (Pet. 11), however, on the portion of the plurality opinion in *Winstar* in which only two other Justices joined. 116 S. Ct. at 2466-2467 (opinion of Souter, J.). In any event, the reasoning of the *Winstar* plurality would not bar the application of the "sovereign acts" doctrine here because the Energy Policy Act bears none of the indicia of a "governmental object of self-relief" (*id.* at 2465) that the three Justices found present in *Winstar*. See *id.* at 2467 ("The statute not only had the purpose of eliminating the very accounting gimmicks that acquiring thrifts had been promised, but the specific object of abrogating enough of the acquisition contracts as to make that consequence of the legislation a focal point of the congressional debate.").

Moreover, as the court of appeals explained, "some utility/Government contracts are not embraced by

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any environmental or other hazards that production engendered, or that the government promised to indemnify petitioner for any liability for such costs. Cf. Pet. App. 20a ("The language of the contract[s] is directed at the prices charged for providing enriched uranium to [petitioner], and not to any decontamination or decommissioning costs which subsequently may arise.").

the Act, while some purchases from private entities are covered." Pet. App. 10a. The court of appeals further explained that "[t]he reach of the Act * * * makes clear that Congress was not focused on a retroactive increase in the price of the Government's prior contractual agreements." Instead, "the Act targets whichever utility eventually used and benefited from the DOE's enrichment services." *Ibid.* Unlike the congressional action in *Winstar*, 116 S. Ct. at 2467-2469 (opinion of Souter, J.), petitioner points to nothing in the legislative history that indicates that Congress intended to alter the terms of petitioner's contracts. Accordingly, the court of appeals correctly concluded that the Energy Policy Act's impact "on those utilities with which the Government had prior contracts is 'merely incidental to the accomplishment of a broader governmental objective.'" Pet. App. 10a-11a (quoting *Winstar*, 116 S. Ct. at 2466 (opinion of Souter, J.)).

b. The court of appeals also correctly concluded (Pet. App. 14a-21a) that the "unmistakability" doctrine would bar any contract claim petitioner might have. Petitioner seeks an "exemption from the terms of [a] statute," and such a claim "could not be recognized without effectively limiting sovereign authority." *Winstar*, 116 S. Ct. at 2457 (opinion of Souter, J.). Petitioner seeks the return of all the money it paid the government under the special assessment—a remedy identical to an injunction against application of the law to it—and thus must overcome the "unmistakability" doctrine in its strongest form.[3]

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[3] The application of the "unmistakability" doctrine in this case is also supported by both concurring opinions in *Winstar*. Both Justice Breyer's and Justice Scalia's concurring opinions

Petitioner's sole attempt to overcome the "unmistakability" doctrine consists of its assertion (Pet. 12) that its fixed-price purchase contracts with the government impliedly promised that the government would not "*release* itself from contractual liability simply by enacting legislation that is principally *directed* at its own contracts." As explained *supra*, however, the Energy Policy Act has not rendered impossible the government's performance under its contracts, because the government already has fulfilled its side of the bargain by providing petitioner with enriched uranium at the price fixed under its contracts. See Pet. App. 6a n.2, 25a. Similarly, the Act is not directed at changing the terms of petitioner's fixed-price contracts, but rather applies to all utilities that benefited from the enriched uranium services provided by the DOE. *Id.* at 10a-11a. Nothing in petitioner's contracts reflects an "unmistakable" statement by the government surrendering its sovereign authority to impose a special assessment on those domestic utilities that purchased the contaminating uranium enrichment services either directly from the DOE or from other utilities.

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expressed the view that the "unmistakability" doctrine reflects ordinary principles of contract interpretation. See 116 S. Ct. at 2472-2476 (Breyer, J., concurring); *id.* at 2477 (Scalia, J., concurring in the judgment). In the present case, there is no express contract term that overcomes the presumption that "[g]overnments do not ordinarily agree to curtail their sovereign or legislative powers." *Ibid.* Indeed, the promise alleged by petitioner—that the government alone would incur all costs involved in decommissioning and decontaminating enrichment plants—is simply "*not mentioned* in the contract[s] at issue." *Id.* at 2474 (Breyer, J., concurring).

3. Petitioner also contends that the Energy Policy Act violates the Due Process Clause of the Fifth Amendment. Petitioner argues (Pet. 16-19) that the special assessment violates the Due Process Clause because it retroactively imposes costs upon petitioners that the government assumed under its prior contracts with petitioner. Petitioner further argues (Pet. 17-18) that the Act imposes a financial obligation based on conduct by petitioner that is insufficiently connected to the purpose for which the money is collected.[4] Petitioner did not, however, press either of those contentions below. Accordingly, those issues are not properly before this Court. See, *e.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("Ordinarily, this Court does not decide questions not raised or involved in the lower court."); accord *Auer* v. *Robbins*, 117 S. Ct. 905, 912 (1997); *Citizens Bank of Maryland* v. *Strumpf*, 116 S. Ct. 286, 290 n.** (1995); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981).[5]

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[4] Petitioner errs in asserting (Pet. 17-18, 21 n.17) that this case raises a question similar to the due process question presented in *Eastern Enterprises* v. *Appel*, cert. granted, 118 S. Ct. 334 (1997) (No. 97-42), and thus should be held pending the Court's decision in that case. Petitioner acknowledges (Pet. 17) that it purchased and used the uranium enrichment services that created the contamination. Thus, the question framed in *Eastern Enterprises*—whether activity may later be made the subject of financial obligations if that activity "did not contribute" to the public problem that the money is collected to address (97-42 Pet. i)—is not present in this case.

[5] Petitioner did argue below that the special assessment amounts to a taking of property for which compensation is due. Pet. App. 21a n.8. Petitioner does not, however, renew that contention in this Court.

In any event, petitioner's due process arguments are without merit. Petitioner's assertion (Pet. 18) that the special assessment unconstitutionally makes petitioner responsible for the government's "*own* financial liabilities" merely restates its contract claim, which, as discussed *supra*, has no legal or factual support. Petitioner's argument (Pet. 16-19) that the special assessment is unconstitutional because it imposes financial obligations upon entities that are not responsible for the problem underlying the legislation, or because it is based upon conduct excessively far into the past, is similarly without merit.

It is "well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). That presumption is not overcome by the mere fact that legislation has "upset[] otherwise settled expectations," or that "the effect of the legislation is to impose a new duty or liability based on past acts." *Id.* at 16. As long as the legislation's retrospective aspects are supported by separate rational justifications, a statute's retroactivity does not implicate due process concerns.

In enacting the Energy Policy Act, Congress rationally concluded that the cost of decontaminating and decommissioning the uranium enrichment plants that had supplied enrichment services to domestic utilities since the 1950s should be shared by all of the participants in the relevant market, including the government and those utilities that used the enriched uranium to produce electricity for their retail cus-

tomers. Pursuant to the Act, the government pays more than 68% of the total decontamination and decommissioning expense. 42 U.S.C. 2297g-1. Moreover, unlike the government's contribution under the Act, the utilities' contribution is subject to an annual cap, 42 U.S.C. 2297g-1(c), and an aggregate cap, 42 U.S.C. 2297g-1(e). That approach was supported by representatives of the domestic nuclear utility industry, including an association of which petitioner was a member. See page 2, *supra*.

Petitioner presents this Court with no principle that overcomes the Energy Policy Act's presumption of constitutionality or justifies any second-guessing of Congress's policy judgment. The fact that the DOE once used fixed-price contracts to sell enrichment services to petitioner simply has no bearing on the issue of whether Congress had a rational basis for deciding to spread the cost of the decontamination and decommissioning among the participants in the transactions that necessitated those expenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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